

**MAY 26 2006**

**CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS**

**NOT FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,

Plaintiff — Appellee,

v.

SAM JOSEPH RICO,

Defendant — Appellant.

No. 05-10315

D.C. No. CR-04-01565-JMR

MEMORANDUM<sup>\*</sup>

UNITED STATES OF AMERICA,

Plaintiff — Appellant,

v.

SAM JOSEPH RICO,

Defendant — Appellee.

No. 05-10420

D.C. No. CR-04-02170-JMR

Appeal from the United States District Court  
for the District of Arizona  
John M. Roll, District Judge, Presiding

Argued and Submitted May 18, 2006  
San Francisco, California

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<sup>\*</sup> This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Before: B. FLETCHER, KOZINSKI, and FISHER, Circuit Judges.

Defendant-Appellant Sam Joseph Rico was convicted of two counts of transportation of illegal aliens in violation of 8 U.S.C. §§ 1324(a)(1)(A)(ii) and (B)(iii). Rico challenges the legality of the stop and appeals the district court's denial of his motion to suppress. The government cross-appeals the sentence.

We affirm the denial of the motion to suppress and remand for resentencing.<sup>1</sup>

## I.

Rico argues that the stop of the vehicle was not supported by reasonable suspicion. Whether an investigatory stop is supported by reasonable suspicion is a mixed question of fact and law that is reviewed de novo. *United States v. Diaz-Juarez*, 299 F.3d 1138, 1140 (9th Cir. 2002). The underlying factual determinations are reviewed for clear error. *Id.*

The Fourth Amendment's protection against unreasonable searches and seizures extends to investigatory stops of vehicles by the Border Patrol; such stops must be supported by reasonable suspicion. *See United States v. Brignoni-Ponce*, 422 U.S. 873, 881-83 (1975). In determining whether the agent had reasonable

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<sup>1</sup> Because the parties are familiar with the facts of this case, we recite them only as necessary to our decision.

suspicion of criminal activity, courts look at the totality of the circumstances.

*United States v. Arvizu*, 534 U.S. 266, 273 (2002).

Rico was traveling away from the border in the middle of the night, on a stretch of road that accessed only three small Tohono O’Odham Indian villages. There were no national parks, shopping centers, or other attractions nearby, and the car did not have a rear license plate, so Agent Grupe could not verify whether the occupants were from the area. The car was heavily-laden, indicating weight in the trunk. The district court did not err in concluding that the stop was supported by reasonable suspicion of a trafficking offense.

## II.

A sentencing court can consider conduct of which the defendant has been acquitted, so long as it has been proved by a preponderance of the evidence. *United States v. Watts*, 519 U.S. 148 (1997). *Watts* is still good law after *United States v. Booker*, 543 U.S. 220 (2005). *Cf. United States v. Johnson*, No. 02-50618, 444 F.3d 1026, 1030 (9th Cir. 2006). Rico conceded during oral argument that the district court erred in refusing to consider acquitted conduct that may have satisfied U.S.S.G. § 2L1.1(b)(5). Because the district court incorrectly applied the advisory Sentencing Guidelines, we remand for resentencing so that the district court may determine whether a preponderance of the evidence indicates that Rico

intentionally and recklessly created a substantial risk of death or serious bodily injury to the aliens he was convicted of transporting. *See United States v. Cantrell*, 433 F.3d 1269, 1279 (9th Cir. 2006).

### **III.**

We AFFIRM the district court's denial of Rico's motion to suppress and REMAND for resentencing.